IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy	)	
	)	
Between	)	
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS , LOCAL NO. 39,	)	
	)	
Union,	)	OPINION AND AWARD
	)	
and	)	FRANK SILVER, Arbitrator
PLACER COUNTY SUPERIOR COURT,	)	
	)	CSMCS No. ARB-04-2746
Employer.	)	
	)	October 11, 2005
RE: Training pay grievance	)	
	)	

This dispute arises under the Memorandum of Understanding between the above-named parties. Pursuant to the terms of the MOU, this Arbitrator was selected from a panel provided by the State Mediation and Conciliation Service to hear the evidence and to determine the issues.

A hearing was conducted on May 20, 2005 in Auburn, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Both counsel submitted post-hearing briefs which were received on July 11 and 12, 2005.

APPEARANCES:

On behalf of the Union:

Brooke D. Pierman, Weinberg, Roger & Rosenfeld, Sacramento, CA

On behalf of the Employer:

Michael A Bishop and Roger Yang, Matheny, Sears, Linkert & Long, LLP, Sacramento, CA

ISSUE

Did the Court violate section 7.11 of the Memorandum of Understanding (MOU) by failing to pay the training incentive bonus to Lynn Toms, Haydee Sigler, and Renee Harmon with regard to the training of Katy Lopez, as identified in the October 1, 2004 grievance?[1] If so, what is the appropriate remedy?

PERTINENT PROVISIONS OF THE AGREEMENT

7.11 – Training Incentive

Employees other than Supervisory and Senior Court Services clerks who are assigned to train another employee for forty or more hours shall receive a training bonus of 7% for the duration of the assignment.

FACTS

A. The 2001 negotiations; Payment of the training incentive bonus under the 2001 MOU.

Prior to 2001, employees of the Superior Court were covered by the Memorandum of Understanding between the Union and Placer County. In 2001, the Court was administratively separated from the County, and it entered into a separate MOU with the Union. In those negotiations, the parties agreed to the language quoted above as section 7.11. The same language was subsequently carried over in the 2004-206 MOU.

[1] In the correspondence and briefs the parties refer variously to section 7.11, 7.12, or 7.13 as the Training Incentive provision. Although the numbering appears to be confused, apparently due to re-numbering in subsequent versions of the MOU, the parties agree that the quoted language is the provision which is in dispute in this grievance.

The chief spokespersons during the 2001 negotiations were Union business agent Chuck Thiel and independent labor relations consultant Lee Clark, representing the Court. In large part, the negotiations involved transferring and adapting many of the provisions which had been part of the old MOU between the County and the Union, as well as the County's administrative rules. The training incentive bonus was based on the County's out-of-class rule, but the specific language was initially proposed by the Union as: "Any employee assigned by the appointing authority to train another employee shall receive five percent training pay for the duration of the assignment." Clark raised two objections to this proposal: that it did not exclude supervisors who performed training as part of their regular job duties and that it was not limited to meaningful, assigned training assignments as opposed to casual training situations. (Tr. 196-197.) Thiel was in agreement that the language should not create a flood of grievances in situations where an employee merely answered a question from another employee and then called that training (Tr. 145-146). As a result of these concerns, the parties quickly agreed to exclude supervisory and senior court services clerks from eligibility, and to require a training assignment of forty hours or more to qualify for the bonus.

In the late summer of 2002, criminal division supervisor Sharry Shumaker initiated a program to train courtroom clerks to work in different departments than their regular assignment. This was necessary because the clerks were generally assigned to a specific judge, with different specialized assignments, and were not exposed to procedures in different departments. For instance, Department 13 handles criminal proceedings other than actual trials, such as arraignments, preliminary hearings, conferences, sentencing, while other departments handle criminal and civil trials. Other departments handle specialized calendars in family law, juvenile,

and probate matters. The 2002-2003 training program was designed to provide courtroom clerks with sufficient training in the various departments to provide flexibility for purposes of vacation relief and similar needs.

Shumaker selected three experienced courtroom clerks to act as trainers in the different divisions: Lynn Toms for the criminal division, Kimberly Harding for family law, and Celli Baker for juvenile. As part of their assignment, the trainers prepared outlines of the training, and evaluation forms listing the job duties and typical tasks covered during the training for the particular department, along with a space for the date each topic was covered. The program lasted several months, and each of the trainers was assigned three or four different clerks, each of whom trained individually for four to six weeks. During the training, the trainee spent each work day with the trainer in her courtroom, and the trainer continued to be responsible for the performance of the normal courtroom duties. At first the trainer performed the regular duties, explaining the procedures and legal requirements to the trainee while the trainee observed, and after a week or two the trainee would begin to practice, for instance by taking "mock minutes" while the trainer took the official minutes of the court. Gradually, the trainee transitioned into performing actual duties while the trainer was present to supervise and answer questions. At the end of the training, the trainer and trainee would meet with Shumaker to review the evaluation forms and discuss what had been covered.

Each of the three trainers received the training incentive bonus during the 2002-2003 training program. Shumaker testified that she recommended the bonus because this was a significant undertaking for the trainers and an important project for the court (Tr. 218).

Lynn Toms testified that after the 2002-2003 training project, and before September 29,

2004 when the current grievance arose, she trained at least three other clerks to cover the Department 13 criminal calendar. Toms worked in Department 13 on Mondays and Tuesdays, and then went with her assigned judge to Department 1, a trial court, on the remaining days of the week. Two other judges and their clerks were assigned to Department 13 on Wednesday, Thursday, and Friday. Unlike the 2002-2003 training project, when the trainee-clerks went with Toms to Department 1 after spending Monday and Tuesday in Department 13, the subsequent assignments involved training only in Department 13, so that the trainee remained in that Department the entire week, working with Toms on Monday and Tuesday, and with the other two clerks who were assigned on the other days (Tr. 66-67). It is not clear from the record whether Toms spent as much as forty hours in any of these training assignments. She was not paid the training incentive bonus, and when she questioned Shumaker about this, she was told that the earlier training was a "special project" and that this training was not.

In approximately August of 2003, Kimberly Harding was asked to train another clerk in family law, and she left the courtroom where she was then assigned to go into the courtroom of the family law judge to perform the training. She testified that she performed the training in the same way as she had previously (during the 2002-2003 training project), using the outline of job duties that she had prepared for the previous training. As before, she was responsible for performing the regular courtroom duties while gradually training the other clerk to take over those duties. For this training, however, she was not paid the training incentive bonus. When she questioned this, there was a series of emails in which Nancy Davis, the deputy court administrative officer, explained as follows:

> "The training incentive is designed for special training projects or out of the ordinary circumstances. It was not meant to be, nor has it ever been used for the purposes of

regular cross training that occurs as people are hired or promoted and trying to learn their job for the initial period.

"From what I understand, Sharry received approval for a 'special training project' that was for a fixed amount of time for specific reasons with specific goals in mind. This included paying training incentive to you and the two other clerks. Certain moneys were set aside for this. This project was completed a while back. As I also understand, subsequently you were asked to train a newly promoted courtroom clerk so that she could replace you when needed as part of her ongoing job duties. Therefore, you are not entitled to receive training pay for training a roving clerk to fill in for you." (Un. Ex. 6.)[2]

Harding testified that she was not a member of the Union, and that she accepted the determination by the administration that she was not entitled to training pay without notifying the Union or filing a grievance. It was not until she attended a Union meeting to prepare for the 2004 negotiations that the subject of the training incentive bonus came up and she realized that the Union did not agree with the Court's interpretation as to when the training incentive bonus should be paid.

B. <u>The 2004 negotiations.</u>

Union business representative Kathy Widing was assigned to represent Court employees as the chief Union spokesperson in the 2004 negotiations. She attended the pre-negotiation membership meeting along with Chuck Thiel. At this meeting the subject of training incentive bonus came up, and it was discussed that while the three employees involved in the 2003-2003 training had received the bonus, others who had performed similar training had not. As a result of this discussion, Widing included in a list of "cleanup and clarification" issues, presented to the County at the first negotiating meeting, the following item: "7.13: There is considerable

[2] When questioned about the first paragraph of this email, Clark testified that neither he nor Thiel used the term "special training project" regarding this issue in the 2001 negotiations. He testified that what he tried to convey was that this should be "a real training assignment," and in that sense, not part of ordinary job duties. He testified, and Thiel confirmed, that the Union agreed with this description (Tr. 207-209).

confusion about the intent of training incentive language." (Court Ex. A).

The 2004 negotiations took place in June and July. After the Union presented its "cleanup and clarification" issues, the Court's negotiators stated that they interpreted training pay to apply only to 40 consecutive hours of training, and not to training another employee while performing one's regular duties. On June 21 the Court presented the following proposal:

> "7.13 Training incentive language to replace existing language: Other than Supervisory and Senior Court Services Clerks, employees who are assigned by management the task of training other employees for forty (40) or more hours shall receive an incentive of 5% during the training assignment if the following conditions exists: a.) the duties during the training assignment must be out of the scope of the normal duties for the employee 2.) the employee does not perform his/her regular job duties and/or assignment during the training assignment. This therefore does not include training other employees while performing his/her current job duties." (Court Ex. D.)

Widing testified that she criticized this proposal as "going backwards," i.e. that it was written in a manner that would have excluded the people who had actually received the training bonus (Tr. 175). Nancy Davis testified that she explained that they had paid the bonus for what the Court deemed a "special project," and that the Court's interpretation was that it should apply to training which is out of the ordinary course of business in running the court and not for every-day on-the-job training (Tr. 248-249).

On June 30, the Union countered with the following proposal:

> "Other than supervisory and senior staff, employees who are assigned to train another employee in conjunction with established training guidelines shall be compensated at 5% above their base pay for the duration of the training assignment.

Then on July 20, the Court revised its proposal to the following:

> "Other than Supervisory and Senior Court Services Clerks, employees who are relieved from their current assignment or duties for the purpose of training other employees for at least forty (40) hours shall receive an incentive of 5% during the training assignment."

At this point, Widing again expressed her belief that the Court's proposal was not what the parties had originally intended, and stated that she would withdraw the Union's proposal and file a grievance to determine the meaning of the language (Tr. 175). Davis testified that at that point, she understood that the training bonus provision was *status quo* from what it had been in the 2001 MOU (Tr. 268).[3]

C. <u>The current grievance.</u>

The current grievance arose soon after the 2004 negotiations. On September 29, 2004, juvenile division supervisor Lori Smith sent an email to the three courtroom clerks responsible for Department 13 -- Lynn Toms, Haydee Sigler, and Renee Harmon -- stating as follows:

> "Kathy Lopez will start her training next week in D-13. Even though she will primarily be clerking a misd. arraignment calendar, she MUST know the felony side of it as well. Please teach her all aspects of criminal proceedings and don't limit it to arraignments. Additionally, it's important that she under stand the 'why' part of your job so take the time to explain things." (Emphasis in original.)

On October 1, Widing initiated a grievance, noting that she had informed Nancy Davis that she would be testing the training incentive language through the grievance process. On October 2, Davis denied the grievance at level two, repeating the Court's position regarding the intent of the training incentive:

> "The parties involved in those (2001) negotiations agreed that the incentive was to be paid in circumstances where an employee was relieved of normal duties and assigned to perform only training duties for at least forty or more hours. The intent was not to compensate employees for periodically cross training other employees while still performing and being responsible for their regularly assigned duties. Since the Court does not have a 'training officer' on staff, the training incentive was intended to compensate those employees who are on occasion tasked with the responsibilities similar to that of a 'training officer', someone who's *(sic)* primary function is to train another employee. There is a difference between an employee showing someone how to do a task

[3] The increase of the training bonus from 5% to 7% in the 2004 MOU was unrelated to the discussions over when the bonus would be paid. That increase related to an adjustment in the steps of the salary schedule.

and being responsible for that person learning that task."

According to Lynn Toms, training of Katy Lopez lasted five or six weeks, and Lopez trained with the clerk in Department 13 all day Monday through Friday. On Mondays and Tuesdays, Toms'

days in Department 13, she used the same evaluation form developed in connection with the 2002-2003 training project to make sure that all procedures and job duties were covered in the training. She covered all aspects of the job, and from her perspective, the primary difference in the training was that Lopez trained only in Department 13, and did not go with her to Department 1 on Wednesday through Friday.

Shumaker testified during the 2002-2003 training project, the courtroom clerks who acted as trainers completed the final evaluation forms, and at the end of the training the trainer and trainee met with her (Shumaker) to review the training and determine if everything had been covered (Tr. 215-216). With regard to the training of Lopez in 2004, Shumaker performed the final evaluation herself by sitting in the courtroom for a week to observe Lopez acting as the clerk without Toms' assistance. During Lopez' training, there was email communication between Shumaker and Toms, and the other Department 13 clerk-trainers, as to how the training was proceeding, but the three trainers were not asked to complete written evaluations or to participate in a final meeting to review the training.

POSITIONS OF THE PARTIES

The Union

The Union argues that the language of section 7.11 is unambiguous, containing three requirements: that the employee receiving a training incentive bonus may not be a supervisor or

senior court service clerk, that the employee must be "assigned" to train another employee, and that the training assignment must meet or exceed 40 hours. The Court has attempted to create limitations and exclusions not found in the contractual language, and such attempt should be rejected on the basis that arbitration is an inappropriate forum to renegotiate contract language.

The bargaining history supports the Union's interpretation. The relevant bargaining history is from 2001, and the Union's interpretation is completely consistent with the testimony of Lee Clark, who testified that the incentive was never limited to the performance of "special projects" or "out of the ordinary circumstances." Nor was the section limited to situations in which an employee was relieved of regular duties to perform training.

The training duties performed by the courtroom clerks were extensive, involving every facet of each respective department. In the September 29, 2004 email which initiated the training of Katy Lopez, it was made clear that the training was to cover every facet of criminal proceedings in Department 13, both misdemeanor and felony sides. This was the type of "real" training assignment contemplated by the parties in negotiations, and not merely "tap on the shoulder" training. This was the same type of training performed by three clerks in 2002-2003, for which they received the training incentive bonus. There was no justification for denying the bonus in September 2004.

For these reasons, the Union asks that the Court be directed to pay the affected employees all amounts due under section 7.11 for the training which was performed.

The Court

The Court argues that the language of section 7.11 requires that a non-supervisory

Union's position

employee be assigned to training another employee for 40 or more hours, meaning that the employee must be temporarily removed from his or her regular job and placed in a dedicated assignment to train another employee or employees for a set amount of time. The section does not refer to the performance of the employees regular duties, or providing a bonus for answering questions about their jobs. In addition, the section has never been construed to mean that forty hours could be aggregated over an indefinite period of time.

As implemented, the training incentive was intended only for significant, exceptional training duties, not the performance of ordinary duties. Both parties in 2001 understood that the incentive would not be used for everyday on-the-job training, but for *bona fide* training assignments. In 2002-2003 the Court used the training incentive for an intense, six to eight month project designed to cross-train clerks in the criminal, juvenile, civil, and family divisions to provide flexibility in scheduling. It was an intense, unprecedented attempt to create a staff of employees who could pass on their knowledge to others. Since that special project, the Court has not instituted similar training programs, nor has it needed to. Creating training materials, generating training schedules and evaluating trainees are significantly outside an ordinary employee's job responsibilities and justified payment of the incentive.

None of the employees who provided on-the-job training after the 2002-2003 special program have evaluated their trainees, generated additional training materials, or created training schedules. As shown by the testimony of Lynn Johns, the more recent training is much less intense, and as opposed to the special project when it took about three weeks for a trainee to touch a file, now "it's a matter of days." This training is not comparable to the depth and breadth

Employer's position

of training provided during the special project. The training of Katy Lopez was no different than the on-the-job observation and shadowing that is an ordinary part of any clerk's job. In distinction, a clerk from the family law department who traveled to Lake Tahoe to conduct training for one week received training incentive because she was removed from her job an sent on a specified training assignment.

The 2004 negotiations confirmed the Court's interpretation since, at the Union's request, the Court consistently repeated its interpretation, and only in response did the Union counter with a new proposal. Instead of working to find mutually acceptable language, the Union chose to test the old

language through the grievance procedure. In doing so, it withdrew its proposal which would have broadened the language to cover all training. The Court has never changed its way of applying the training incentive program since it was negotiated in 2001.

Accepting the Union's interpretation would create administrative problems by making it difficult to distinguish between "tap on the shoulder training," shadowing, or merely observing. Also, applying the training incentive to on-the-job training would be prohibitively expensive.

For all of these reasons, the Court argues that the grievance should be denied.

DISCUSSION

In a case of contract interpretation, it is fundamental that an arbitrator or a court must determine the intent of the parties by first examining the words of the contract itself, and if the language of the disputed provision is clear and unambiguous, it should be enforced as written since the jointly-agreed language is the best evidence of what the parties mutually intended.

Employer's position

Only if the language is ambiguous is in proper to resort to extrinsic evidence – evidence other than the contract language itself – to determine the parties' intent. In the context of collective bargaining, the most common types of extrinsic evidence are negotiating history and the practices of the parties in interpreting and applying the disputed contract provision.

In this case, the disputed contract language in section 7.11 is relatively straightforward:

> "Employees other than Supervisory and Senior Court Services clerks who are assigned to train another employee for forty or more hours shall receive a training bonus of 7% for the duration of the assignment."[4]

On its face, to qualify for the training incentive bonus, an employee, other than a supervisor or senior court services clerk, must meet two requirements: He or she must be "assigned" to train another employee, and the training must take at least forty hours. The requirement that an employee must be assigned is unambiguous, and it protects against an employee's claim to have trained another employee although the training was not initiated or approved by management. In the current case, there is no dispute that the three Department 13 clerks on whose behalf the grievance was initiated were in fact assigned to train Katy Lopez on all aspects of criminal proceedings in that Department. The September 29, 2004 email from juvenile division supervisor Lori Smith, and approved by criminal division supervisor Sharry Shumaker, establishes that this was an assignment, and not informal training voluntarily undertaken by the trainers.

The forty-hour requirement is more ambiguous, since the contract language does not specify whether the forty hours must be consecutive or may be spread out over a period of time.

[4] As noted previously (fn. 1) the numbering of this contract section is a matter of some confusion. There is no confusion, however, as to the actual contract language which is in dispute, and for convenience the contract section will be cited as 7.11.

There is no evidence that the parties discussed this distinction in either the 2001 or 2004 negotiations, and so there was no specific agreement on this point. From the testimony of Lynn Toms, she trained Lopez two full days each week for a five or six week period, and so there was cumulatively more than forty hours of training on a set schedule over a relatively short period of time. It must be concluded, in the absence of any contrary agreement, that forty hours under these circumstances meets the technical requirements of section 7.11.[5]

Therefore, the two conditions expressly set forth in section 7.11 have been met, and on that basis it would appear that the Department 13 clerks who trained Lopez in accordance with the September 29, 2004 email were entitled to the training incentive bonus. Nevertheless, the Court contends that this training assignment did not qualify for the bonus because the parties intended, at the time the provision was negotiated in 2001, that the bonus would be paid only for "special training projects" in which, according to the Court's level two response, "an employee was relieved of normal duties and assigned to perform only training duties for at least forty or more hours."

In considering this argument, it must first be noted that section 7.11 is relatively unambiguous on its face, with the only ambiguity relating to whether forty hours must be consecutive or cumulative. Therefore, it is questionable whether evidence of negotiating history is relevant as further evidence of the parties' intent. Even assuming, however, that there is latent ambiguity in terms of how the contract provision should be applied in particular factual

[5] Toms' testimony concerning the amount of time she spent training Lopez was not challenged by the Court, although one would assume that there are payroll records or other personnel records that would establish exactly how many hours were involved in the training assignment. Also, whether the other two trainers, Haydee Sigler and Renee Harmon, met the forty hour requirement is somewhat indefinite at this point, and this issue will be addressed in a later portion of this decision.

circumstances, the evidence relating to the 2001 negotiations does not support the Court's position. The Court's negotiator, Lee Clark, and the Union's negotiator, Chuck Thiel, are in basic agreement as to what occurred in those negotiations. Very little time was spent on this issue in negotiations. The Union made an initial proposal, based on the County's old out-of-class rule, that an employee "assigned . . . to train another employee" would receive a five percent bonus for the duration of the assignment. On behalf of the Court, Clark objected that supervisory employees who conduct training as part of their normal job duties should not receive the bonus, and that the bonus should be paid only for meaningful training assignments, as opposed to casual training situations. Thiel quickly agreed on both issues, and for that reason supervisors and senior court services clerks were excluded and the forty-hour requirement was added.

This evidence demonstrates that the parties at the bargaining table explicitly considered the distinction between meaningful training assignments as opposed to casual, "tap on the shoulder" training, and it was agreed that the two conditions stated in the contract language – that the training be assigned and that it take at least forty hours – would establish when the training incentive should be paid. Although the Court's administrators, who were not present at the bargaining table, may have believed that further conditions were intended, the only relevant evidence of negotiating history is the shared understanding of the parties based on proposals exchanged and discussions at the bargaining table. Based on that evidence, the parties intended that the two conditions expressly stated in section 7.11 would determine eligibility for the training incentive bonus.

In addition, the evidence relating to the 2002-2003 training project shows that the training incentive has been paid for "shadow training," i.e. training in which the trainer is not relieved

from his or her regular duties while conducting the training.[6] While the 2002-2003 project included, in addition, preparation of schedules and evaluation checklists, which have also been used in later training, the actual training since that time has been conducted in a very similar manner, i.e. the trainee comes to the trainer's classroom and observes while the trainer performs and explains the official duties, and gradually the trainee practices while the trainer continues to perform the duties until the trainee is able to take over the duties under the direct supervision of the trainer. During the 2002-2003 project the trainers filled out the checklist evaluation forms and participated in final evaluation meetings with Shumaker. Although this was not done in 2004, the trainers did provide input to the evaluation by means of periodic emails to Shumaker. Therefore, the 2002-2003 project was more formal and extensive, but subsequent training has followed the same basic model. For that reason, so long as training of this type is assigned and meets the forty hour requirement, it qualifies for the training incentive bonus under section 7.11.[7]

For the above reasons, it is concluded that the training of Katy Lopez in Department 13 qualified for the training incentive bonus, subject to the condition that each of the three trainers conducted training for a cumulative total of forty hours or more. Verification of the number of hours and computation of the amounts will be remanded to the parties.

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[6] Except for the single situation in which a clerk was sent to the Lake Tahoe office to train another clerk for a week, there is no evidence that any training conducted by the Court has involved removing the trainer from his or her regular assignment for the period of the training, such as by conducting classroom training.

[7] There is evidence that some training of this type took place prior to the 2004 negotiations and was not grieved or brought to the Union's attention until the proposal meeting with the membership. What actually occurred in those instances is not clear from the record, and in particular, there is no evidence that any of this training met the forty hour requirement. The evidence is not sufficient to demonstrate a mutually-recognized, longstanding past practice that would establish the Union's acquiescence that the training incentive would not be paid in these situations.

The discussions relating to this issue during the 2004 negotiations served to crystallize the parties' respective positions on the issue, but in view of the facts that all proposals were withdrawn and the parties retained the original language negotiated in 2001, these negotiations did not result in a change in the interpretation of section 7.11.

AWARD

1. The Court violated section 7.11 of the 2004 Memorandum of Understanding by failing to pay the training incentive bonus to grievants Lynn Toms, Haydee Sigler, and Renee Harman with regard to the training of Katy Lopez, as identified in the October 1, 2004 grievance.

2. As a remedy, the grievants are entitled to payment of the 7% training bonus for the duration of the training assignment, subject to the condition that each grievant spent forty hours or more in the assignment.

3. Calculation of the amounts due the grievants is remanded to the parties, with the Arbitrator reserving jurisdiction over implementation of the remedy.

Dated: October 11, 2004

_____Frank Silver, Arbitrator